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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 242

KARE PETERSON,

Petitioner,

against

SEABOARD MARINE SERVICE CORPORATION and THE STATE INSURANCE FUND,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case April 28, 1959.

Opinions Below

The opinion of the United States District Court, for the Southern District of New York, is officially reported in 159 Fed. Supp. 27.

The opinion of the United States Court of Appeals is not yet officially reported and is printed in Appendix "A".

Jurisdiction

The judgment of the United States Court of Appeals was dated and entered April 28, 1959. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254 (1).

Question Presented

Question presented is whether an employee claiming compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A., Sec. 901, *et seq.*) and who recovered in a common law action against a third party tort feasor responsible for his injuries, must be twice compensated for the same period of disability, once by the tort feasor and again by the employer.

Statute Involved

33 U.S.C.A., Sec. 901, *et seq.*

Statement of the Case

Kaare Peterson, while in the employ of Seaboard Marine Service Corp., sustained an accident on January 21, 1950, and made claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act. The employer's liability under the Act is not disputed.

Compensation benefits at the total disability rate of $35.00 per week were commenced and paid from January 22, 1950, to December 5, 1951, for a total of $3,410.00. Medical and hospital bills totalling the sum of $2,551.87 were also paid.

On December 4, 1951, the claimant filed with the Deputy Commissioner Notice of Election to Sue a Third Party.

Whereupon the payment of compensation benefits were suspended in accordance with the provisions of the law. Suit was commenced against the Waterman Steamship Co. and was settled for the sum of $25,000.00 with the consent of The State Insurance Fund, the insurance carrier.

The settlement in the sum of $25,000.00 was disbursed as follows:

(a) $9,036.13 for attorney's fee, court costs and litigation expenses.

(b) The State Insurance Fund received the sum of $5,963.87, which sum consisted of $3,410.00 paid in compensation benefits and $2,553.87 paid for medical and hospital expenses.

(c) The balance of $10,000.00 was paid to the injured employee.

Subsequent to the settlement of the third party action and the disbursement of the third party recovery, the claimant alleged that he is permanently and totally disabled as a result of the accident. Based thereon the Deputy Commissioner under the Longshoremen's and Harbor Workers' Act made an award from January 22, 1950 (first day of disability) to July 6, 1957, at the rate of $35.00 per week totalling the sum of $13,615.00, the Commissioner credited the carrier with the sum of $10,000.00, leaving a balance of $3,615.00 due the claimant in the opinion of the Deputy Commissioner.

The respondents contend that they should have been credited with the sum of $13,410.00, leaving a balance due the claimant on account of the above award in the sum of $205.00.

Although duly served, no answer was interposed by the Government in behalf of defendant, Arnold J. Quigley, Deputy Commissioner, Bureau of Employees' Compensation.

Argument

The petition should be denied for lack of conflict of opinion in the lower courts, for lack of substantial question of law involving the interests of a substantial segment of people.

The question attempted to be presented by petitioner has no mass significance or implication.

When consideration is given to the fact that but a small percentage of the American laboring force sustains industrial injury and that a minute percentage thereof is in employments under the protection of the Longshoremen's and Harbor Workers' Act and that an insignificant percentage thereof have tort feasor liability elements, it is apparent that the question attempted to be presented is puny indeed and unworthy of this Honorable Court's consideration.

The petition presents no questions of law even though it alleges at page 2, under "Reasons for Granting the Writ", that the Courts below interpreted the law in a manner which constitutes a radical departure from the well recognized and uniform holdings followed by "Deputy Commissioners over the years and throughout the country." The claim made is completely unsubstantiated. Certainly there is no proof of any nature in the record or otherwise that "Deputy Commissioners over the years and throughout the country" ruled or acted under similar facts in the manner contended for by the petitioner.

The petition presents no question of law even though the petitioner alleges at page 2 under "Reasons for Granting the Writ" that "there is a conflict of decisions between that by the Court below" and certain enumerated cases.

It is respectfully pointed out that none of the cited cases passed upon the question presented to the Courts below,

with exception of affirming the right of an employer to reimbursement out of the proceeds of recovery from third parties of compensation benefits advanced by the employer, there is complete lack of direct decision or even *obiter dicta* definitive or decisive of the question presented to the Courts below.

Within the scope of a compensation claim the proceeds of recovery in a third party action is in reality compensation and is therefore lumped with compensation payments made by the employer and carrier.

It has been judicially declared time and again that the fund created by the proceeds of a third party settlement in a compensation claim to the full extent thereof, if necessary, is for indemnification of the employer and carrier for compensation benefits paid. It is therefore in essence endowed with the characteristic of compensation. That is why the respondents alleged in Paragraph "Seventeenth" of the Bill of Complaint that:

> "The claimant received a total of $28,410.00 from the Waterman Steamship Co. and The State Insurance Fund representing the verdict against the said Waterman Company in the sum of $25,000 and the compensation received from The State Insurance Fund, the insurance carrier for the Seaboard Marine Service Corp. in the sum of $3,410.00."

It is only when the validity of the above allegation is understood that the issue of the amount that the employer and carrier must be credited with can be correctly ascertained. We therefore respectfully submit the following proposed computation in order that the essence of the respondent's position may be seen and properly evaluated both arithmetically and visually:

Third Party Recovery (gross)		$25,000.00
Expenses: Attorney's Fee and Misc. Expenses		9,036.13
Net Recovery		15,963.87
Compensation Paid	$3,410.00	
Medical Expenses Paid	2,553.87	
	$5,963.87	
State Insurance Fund Recovery from Third Party Carrier		5,963.87
Amount Actually Collected by Claimant from Third Party		10,000.00
Amount Collected by Claimant as Compensation		3,410.00
Award from January 22, 1950 to July 5, 1957		13,615.00
Total Money Benefits Received by Claimant		
Deficiency Compensation Due as of July 6, 1957		205.00

It is respectfully contended that the above computation is in accordance with the intent of the statute and does no violence to the rights of either the claimant or the employer and carrier.

In order to once more demonstrate the validity of the appellees' position the court is respectfully asked to assume that no payments of compensation were made and that a recovery in the sum of $25,000.00 was obtained in the third party action and that an award was made from January 22, 1950, to July 6, 1957, totalling the sum of $13,615.00. Is there any question that the employer and carrier would have the right to charge the award against the amount actually received by the claimant from the

third party recovery? Under such circumstances the computation would be as follows:

Third Party Recovery (gross)	$25,000.00
Expenses: Attorney's Fee and Misc. Expenses	9,036.13
Net Recovery	15,963.87
Medical Expenses Paid	2,553.87
Amount Actually Collected by Claimant from Third Party	13,410.00
Award for Compensation from January 22, 1950 to July 6, 1957	13,615.00
Deficiency Compensation Due as of July 6, 1957	205.00

By failing to reply the petitioner concedes the validity of the opinion and position of the District Court affirmed by the Court of Appeals that "if plaintiffs are compelled to pay the award without credit for the $3,410.00 included therein, Peterson will have been doubly imbursed for the period involved, once by Waterman in the settlement and, again by the plaintiffs under the award."

While the petitioner speaks of "liberal interpretation of the statute" (p. 5) he does not fully comprehend or refuses to accept the fact that the Compensation Law was not created for his profit. He has become obsessed with the error that since the employer was reimbursed the sum of $3,410.00 it is not conceivable that it should be credited with the payment even though as the District Court declared and the Court of Appeals agreed that he would be twice paid for the same period were the Commissioner's direction to stand.

This controversy and possible misunderstanding on the part of the petitioner may have been avoided were the

award to have commenced on December 1, 1951, under which circumstances the employer and carrier would have been entitled to credit only to the extent of the $10,000.00 received by the appellant from the third party recovery.

On December 5, 1951, the parties were in *status quo ante*. The petitioner having been advanced and received the sum of $3,410.00 in compensation benefits for the period from January 22, 1950, to December 5, 1951 and the respondents having been reimbursed the sum of $3,410.00 from the third party recovery. However, the award having been made to begin with January 22, 1950, it is quite clear that the respondents are entitled to credit in the sum of $13,410.00.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES G. TIERNEY,
General Attorney,
The State Insurance Fund,
Attorney for the Respondents.